FOR ARGUMENT

Nos. 78-160 and 78-161

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A67)[1] is reported at 575 F.2d 620. The opinions

[1] "Pet. App." refers to the separately bound Appendix to the petition in No. 78-160.

of the district court (Pet. App. B1-B61, C1-C21) are reported at 433 F. Supp. 67 and 57.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1978. A timely petition for rehearing was denied on May 2, 1978 (A. 188-189). The petitions for a writ of certiorari were filed on July 28, 1978. The petitions were granted on November 13, 1978, and the cases were consolidated (A. 189-190). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 194, which applies to property actions between "an Indian" and "a white person," is applicable to this action brought by an Indian tribe and the United States (as trustee for the tribe and holder in trust of its lands) against non-Indian individuals, corporations, and the State of Iowa.

2. Whether the court of appeals erred in applying federal common law rather than state common

law to determine the boundary of the Omaha Indian Reservation.

STATEMENT

These consolidated actions were brought by the Omaha Indian Tribe and the United States as trustee for the Tribe pursuant to 28 U.S.C. 1331, 1345, and 1362 to quiet title to lands on the east bank of the Missouri River. As trustee for the Tribe, the government claimed title to an area that had been surveyed as part of the Tribe's reservation on what was then the west bank of the Missouri in 1867 (the "Barrett survey area"), excluding from its claim lands within this area that were subsequently allotted to members of the Tribe and sold to non-Indians (A. 61-62). Presently at issue are some 2,900 acres.[2]

The Omaha reservation was established pursuant to a treaty signed in 1854. Treaty of March 16, 1854, reprinted at 10 Stat. 1043. In Article 1 of the treaty (10 Stat. 1043) the Tribe ceded to the United States its lands "west from a point in the centre of the main channel" of the Missouri, reserving "for their future home" lands acceptable to the Tribe not to exceed 300,000 acres. In 1855 the Tribe selected the Black Bird Hills area in the Nebraska Territory on

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[2] The Tribe filed two actions that claimed a total of approximately 11,000 acres (A. 100-118, 139-149). A map showing the areas claimed by the Tribe, as well as the Barrett survey area, is reprinted at A. 148. Because the Tribe's claim included the 2,900 acres at issue in the government's suit, the three cases were consolidated, and the Tribe's claim for approximately 8,000 additional acres was severed for later consideration (Pet. App. B5).

the west bank of the Missouri River as the site for their reservation (A. 266, 270-274). The boundary of the reservation was the center of the main channel of the Missouri River (A. 268-270; Pet. App. B3, A6 & n.5).[3] In 1867 T. H. Barrett of the General Land Office surveyed the reservation, and his survey showed that the reservation included a substantial peninsula jutting east toward the Iowa side of the river (see Plate I, Pet. App. A10), around which the river then flowed in an ox-bow curve known as Blackbird Bend. The 2,900 acres claimed by the United States are bounded by the Barrett survey line on the north, east, and south, and by the present boundary between Iowa and Nebraska on the west.[4]

It is generally agreed that the river changed its course a number of times between 1867 and 1923, sometimes moving eastward and sometimes to the west (Pet. App. A7-A9). Since at least 1927, the river has been west of its 1867 position, leaving much

[3] When Nebraska became a state in 1867, the thalweg also became the political boundary between Nebraska and Iowa. In 1943 this boundary was fixed independent of the river's movements by the Iowa-Nebraska Boundary Compact, ratified by the Act of July 12, 1943, ch. 220, 57 Stat. 494.

[4] All of the 2,900 acres claimed by the United States are on the Iowa side of the boundary established by the interstate compact, see note 3, *supra*, and thus venue was properly laid in the United States District Court for the Northern District of Iowa. Another portion of land included within the Barrett survey also lies east of the current bed of the Missouri River, but it is on the Nebraska side of the boundary established by the interstate compact. See the map reprinted at Pet. App. F1. That area is not at issue in the instant case.

of the Barrett survey area on the Iowa side of the river, separated from the remainder of the reservation. As this tract gradually dried out, Iowa residents began to claim the land and to farm it.

The petitioners in No. 78-160 are farmers, or successors in claim of title to farmers, who had possession of much of the land until 1975, when the Tribe took possession (Pet. App. A4).[5] The petitioner in No. 78-161 is the State of Iowa, which claims title to the bed of the Missouri River between the thalweg and the ordinary high water mark, any islands growing out of that portion of the river, and any abandoned channels (A. 90, 152-153).

The primary factual dispute concerned the nature of the river's movements in two periods. Between 1875 and 1879, the thalweg, or center of the main channel of navigation, shifted nearly 6,000 feet to the west, and as much as two-thirds of the Barrett survey area was covered by water at the high flood stage (Pet. App. A8). The Missouri River Commission map of the river in 1879 is reprinted at Pet. App. A11. The parties agreed that subsequent to 1879 the river moved a substantial distance to the north and east, as depicted in the sketch of the river at the northerly high bank reprinted at Pet. App.

[5] The district court granted a preliminary injunction permitting the Tribe's continued occupancy during the pendency of the litigation and requiring an accounting of profits (Pet. App. A4, B4-B5). The court of appeals entered a stay continuing that injunction while the appeal was pending (Pet. App. A4). Having prevailed in the court of appeals, the Tribe remains in possession.

A12. The second disputed period was between 1912 and 1923, when the river moved south and west; by 1923 almost the entire peninsula described in the Barrett survey had been cut off by the river's movements (Pet. App. A9).[6] The location of the river in 1923 is depicted in the Corps of Engineers map reprinted at Pet. App. A12.

The government and the Tribe contended that the river's movements had been avulsive, and, accordingly, that the change in the location of the river had not affected the boundary of the reservation. Petitioners contended that the river had gradually eroded and washed away the reservation lands on the west bank of the river, and that the land on the east bank was new land formed by gradual accretion to the riparian lands (see A. 67, 70, 73-74, 75, 81-83, 130, 132-134, 154, 158-159, 165-166). On this theory, petitioners counterclaimed, seeking to quiet title in their own names (A. 79-80, 87, 92-93, 138, 155, 162, 170-173-175).

The district court first considered the choice of law question. Although petitioners contended that Iowa law applied, and the government and the Tribe contended that federal law applied, the trial court concluded that under *Nebraska* v. *Iowa*, 406 U.S. 117

[6] Regardless whether the movement of the river between 1875 and 1879 was characterized as accretion or avulsion, the nature of the river's subsequent movement between 1912 and 1923 was pertinent to at least the southwestern portion of the Barrett survey area, which remained in tribal ownership in 1879 under either theory (see the 1879 map, Pet. App. A11), but would have been affected by the river's movements between 1912 and 1923 (compare the 1923 map, Pet. App. A12).

(1972), Nebraska law governed river changes prior to 1943 (Pet. App. C3-C8). Under Nebraska law, the court concluded (Pet. App. C15) that the burden of persuasion is on the party seeking to quiet title, who must show the strength of his own title, not the weakness of conflicting claims. The court rejected the government's contention that the burden of proof was governed by 25 U.S.C. 194, which is applicable to property actions where an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." The court concluded that the statute would be applicable only if respondents could show that the land in question is land "left undisturbed and in place through and following an avulsive change of the river channel," rather than new land accreted to the land on the Iowa side of the river (Pet. App. C18-C19). Of course, once respondents established that, there would be no need for resort to the statutory presumption.

The district court concluded (Pet. App. C14) that under Nebraska law "the key indication of an accretion is erosion, [while] the key indication of an avulsion is that the land which is displaced in relation to the river, or remains while the river displaces itself, can be identified as the same piece of land as existed before the change." Acknowledging that "the *crucial* factual issues in dispute are relatively few," and that the definitions of the terms accretion and avulsion are "at the core of this litigation" (Pet. App. B53), the district court concluded that the river changes during the relevant periods were accretive in nature

(Pet. App. B26-B29, B33-B45, B49-B51).[7] It found that the river's "migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners" (Pet. App. B44-B45). Accordingly, the court quieted title in petitioners "to the Barrett Survey land in controversy" (Pet. App. B60).

The court of appeals reversed, finding that the district court's ruling was marred by three fundamental errors (Pet. App. A1-A67). First, the court held (Pet. App. A13-A20) that the district court had

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[7] The district court pointed out that in reaching this conclusion it had not applied the government's definition of avulsion (Pet. App. B56):

> The government's theory would compel us to recognize "jumps" (*Ergo* avulsions) under many other circumstances. If the thalweg were hard against one bank of a river prior to an inundation and subsequent to the inundation appeared suddenly at another place in the river, the government's theory would no doubt necessitate the conclusion that an avulsion had occurred in view of the obvious fact that the thalweg had moved suddenly, in a few hours or a few days, to a new location.
>
> That idea of an avulsion is innovative and thought-provoking but it cannot be reconciled with the common law legal concepts which we discussed earlier in this opinion. The government's criterion for recognizing an avulsion, a sudden movement of the thalweg, is inadequate to provide the conceptual framework for the resolution of this dispute if the Court adheres, as it must, to the common law concepts of accretion and avulsion.

erred in applying Nebraska law rather than federal law in evaluating the facts of the case. It concluded (Pet. App. A13-A15) that because the boundary of the reservation at the times in question was coincidental with the interstate boundary, it should have been determined in accord with the body of federal common law dealing with boundaries of states and other political jurisdictions. Moreover, the court pointed out that the Tribe asserted a right to the reservation arising under and continually protected by federal law (Pet. App. A15-A20). Under *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), the Court concluded that, absent a federal statute making state law applicable, federal law was controlling since state law cannot extinguish Indian title to tribal lands.

Second, the court of appeals concluded that the district court improperly placed the burden of persuasion on the Tribe (Pet. App. A20-A25). Congress's longstanding protectionist policy with regard to Indians is expressed in 25 U.S.C. 194, which places the burden of proof on a party seeking to divest an Indian of title to land. Since the Tribe had proved that the area depicted in the Barrett survey was originally within the reservation, petitioners had the burden of persuading the court that the Indians had been divested of their title.[8]

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[8] The court of appeals noted (Pet. App. A24, n.22) that under Iowa law there is a presumption in favor of accretion, that there is no such presumption under Nebraska law, and that whether such a presumption exists under federal law is

Finally, applying federal law, the court of appeals concluded that the district court had based its ruling on too narrow a definition of avulsion, erroneously "focus[ing] on identifiable land in place as the sole criterion of avulsion" (Pet. App. A27).[9] Emphasizing that the rationale for the doctrine of avulsion is mitigation of the hardship that would otherwise flow from a shift in title caused by sudden river movements (Pet. App. A35-A37), the court concluded (Pet. App. A38-A39) that

> the critical determinant of avulsion is a sudden perceptible shift of the channel. Only where the thalweg gradually moves through the intervening land as a direct consequence of erosion *and* the imperceptible process of accretion to the forming bank do the policies underlying the accretion and avulsion rules justify altering permanent land boundaries to conform with the gradually changing thalweg. [Footnote omitted; emphasis in original.]

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uncertain. But it concluded (*ibid.*) that "[t]he existence of a presumption of accretion, however, does not affect the outcome here," because the Tribe had presented sufficient opposing evidence on the issue of accretion to cause any presumption to lose its vitality. See Fed. R. Evid. 301.

[9] The court of appeals concluded that in the circumstances of this case the absence of certain proof of identifiable land in place through the relevant periods had little probative value. The river had moved at times of extremely high water that inundated large areas that would normally have been dry land, and inferences drawn from the land forms shown on maps prepared during those periods would "be highly conjectural" (Pet. App. A45-A47, A62-A63).

The court of appeals then conducted an extensive review of the testimony and exhibits regarding the river's movements from 1875 to 1879 and from 1912 to 1923 (Pet. App. A39-A67). It concluded (Pet. App. A65; footnote omitted):

> When considered in the context of the broader parameters of avulsion we hold the [petitioners'] case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the [petitioners] have failed in sustaining their burden of proof under § 194.

SUMMARY OF ARGUMENT

I.

Petitioners raise a number of questions about the proper construction of 25 U.S.C. 194, which provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Section 194 is one of a group of statutes—popularly called Nonintercourse Acts—enacted in the late 1700's and early 1800's to protect Indian interests and particularly Indian land rights. The first Nonintercourse Act, adopted in 1790, provided that no conveyance

of land by an Indian tribe would be valid unless made by treaty (Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138), and each of the subsequent acts contained a similar provision. The Nonintercourse Acts also prohibited non-Indians from making settlements on lands belonging to an Indian tribe, and authorized force to remove persons violating that restriction.

The legislative precursor of Section 194 was an 1822 amendment to the Nonintercourse Act then in force. The 1822 amendment was incorporated, with slight changes in language, as Section 22 of the Nonintercourse Act adopted in 1834, and was subsequently codified as 25 U.S.C. 194.

The 1822 amendment and the resulting Section 194 increased the protection afforded Indian lands by placing the burden of proof on non-Indians who claim title to lands or other property previously in the possession or ownership of Indians. Because Section 194 was intended to protect Indians, its interpretation must be guided by the settled rule that requires measures protecting Indians to be liberally construed, and doubtful expressions resolved in favor of the protective policy. *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

A. The first question petitioners pose is whether Section 194 may be invoked in a suit brought by a tribe, or by the United States as trustee for a tribe or for individual Indians. Petitioners argue that because Section 194 refers to suits in which "*an Indian* may be a party on one side," it has no application to a suit

brought by any entity other than an individual Indian.

To construe Section 194 as applicable only where an individual Indian is formally a party would be inconsistent with Congress's broad protective policy, which seeks to shield Indian lands from dubious claims by non-Indians regardless of who is the formal party to the suit. If Section 194 were not applicable to claims by a tribe, it would have little value in protecting Indian trust lands, which typically are held communally by the tribe and not by individuals. Congress could hardly have intended its policy to be so readily frustrated by procedural technicalities, and the rule that ambiguities should be resolved in favor of Indian interests further indicates that such a restrictive interpretation should be rejected.

Petitioners argue that in narrowing the language of the 1822 amendment, which referred to suits by "Indians," to the language used in Section 194, which refers to suits by "an Indian," Congress deliberately sought to exclude tribal claims from the scope of Section 194. The argument ignores the rule of construction of the United States Code, enacted as 1 U.S.C. 1, that unless the context indicates otherwise "words importing the singular include and apply to several persons, parties, or things." It also ignores the fact that the 1822 provision shifted uncomfortably between singular and plural nouns, and that the 1834 version—now codified as Section 194—simply resolved the internal conflict by using singular terms throughout the Section. There is no legislative

history indicating an intent to make any substantive change in the Section, and petitioners' attempt to ascribe such effect to the shift from the plural to the singular falls far short of justifying a narrow reading of a provision intended to benefit the Indian people.

B. The second question petitioners raise concerns the interpretation of the term "white person" in Section 194. They contend that it refers only to individuals of the Caucasian race, and has no application to individuals of other races or to corporations or states. Interpreting the phrase "white person" to refer only to individual Caucasians would defeat the purpose of the statute, since Caucasians could avoid it by simply forming a corporation through which to conduct dealings with Indians. And the statute would provide no protection at all against the claims of non-Caucasians.

There is nothing in the 1834 Act itself or its legislative history to show that Congress intended "white person" to mean anything other than non-Indian—so as to shield Indian property from dubious non-Indian claims. In various sections of the 1834 Act Congress used the terms "white person" or "white people" in contexts where they plainly refer to all non-Indians. The same is true in Section 194.

As petitioners point out, in some portions of the 1834 Act other phrases were used to refer to non-Indians. But this reflects nothing more than the amalgamation in the 1834 Act of various Indian statutes enacted over a number of years, with resulting differences in phraseology from section to section. The omnibus character of the 1834 Act also explains why the Court's ruling in *United States* v. *Perryman*, 100 U.S. 235 (1880), interpreting the term "white person" in another section of the Act, is not controlling here. The *Perryman* decision was grounded on the unique legislative history of the provision in question, which the Court found had been added to exclude fugitive slaves. There was no similar legislative aim here.

There is an additional and compelling reason for interpreting the term "white person" to refer to all non-Indians, rather than Caucasians alone. While statutes providing special protection for Indians are constitutional (*Morton* v. *Mancari*, 417 U.S. 535, 554-555 (1974); *United States* v. *Antelope*, 430 U.S 641, 645 (1977)), a statute that discriminated between Caucasians and other non-Indians, as petitioners contend that Section 194 does, would be open to grave constitutional doubt. Since a construction of Section 194 that avoids this hazard is fairly possible, it should be adopted.

The State of Iowa protests that the language "white person" cannot include a state. But assuming, as we contend, that "white person" means a non-Indian, the State is within the reach of the statute if it is a "person." It is well settled that the statutory term "person" is broad enough to include a state, and that the question is one of legislative intent. Here, the purpose of Section 194 will be served if a state, like any other non-Indian claimant to Indian lands, is required affirmatively to prove its claims.

Otherwise, the protection of Section 194 could be defeated, for example, by the state's purchase of property subject to Indian claims of title.

C. Section 194 was properly invoked in this case. The Tribe and the government established a presumption of title to the Barrett survey area based on previous possession and ownership of that area, which was part of the land that the Tribe ceded to the government and that was set aside and occupied as part of the Omaha Reservation. It is undisputed that neither the government nor the Tribe have conveyed away the legal or equitable title to this area. Accordingly, under Section 194 the burden was on petitioners to prove their allegations that the Indians' title to the area was extinguished by the movements of the Missouri River. Petitioners had to establish their claim that the river's movements destroyed the original land by erosion and rebuilt new land within the same area by accretion, with the legal effect that title to the area was no longer in the Indians but vested in petitioners instead.

D. Petitioners argue that Section 194 must be narrowly construed to avoid jeopardizing title to land in huge areas of the country that once belonged to Indian tribes, and they point to the tribal land claims pending in various courts. Petitioners greatly overestimate the effect that Section 194 is likely to have. Most of the large tribal land claims now pending turn on essentially legal—not factual—issues, such as whether tribal conveyances of large tracts were authorized by treaty as required by the various Non-

intercourse Acts. The burden of proof provision of Section 194 has little bearing on these suits. While adoption of the restrictive interpretations that petitioners propose would indeed reduce the number of cases in which Section 194 could be invoked, it would do so by making the applicability of that Section turn on factors irrelevant to Congress's protective policy, and would thereby frustrate the purpose of Section 194. Neither dislike of the policy of Section 194, nor fear of the statute's unaccustomed use, justifies adopting the construction petitioners advocate. Redress for any such grievances resides with Congress, not this Court.

II.

The court of appeals correctly concluded that federal law, not state law, determines whether the boundary of the Omaha Indian Reservation was altered by the movements of the Missouri River. *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), reaffirmed the longstanding rule that where no federal interest is implicated, state law governs the ownership of the banks and shores of waterways. But there are two independent federal interests that require the application of federal law in this case.

A. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), establishes that federal law must be applied where, as here, Indians assert rights to tribal lands that arise under federal law and are subject to continuing federal protection and supervision. In holding that an Indian claim to such lands presents a question of federal law, *Oneida*

recognized that Indian tribal land claims—unlike ordinary claims to land that was once under federal ownership—are governed by federal law, not state law, because tribal land remains subject to continuing federal interest and control. Indeed, the legal title to the land remains in the federal government, held in trust for the tribe. Accordingly, when a state or other claimants challenge Indian title, the question whether the land has passed out of federal trust ownership is a question that both *Corvallis* and *Oneida* recognize must be resolved by applying federal law.

As this case illustrates, legal doctrines interpreting river movements can substantially alter Indian land holdings. The government claims that 2,900 acres should be restored to the Omaha Reservation, and a claim by the Omaha Tribe to 8,000 additional acres is pending. The application of state law to deprive the Omahas of such large tracts of valuable farm land could seriously impair the purpose of the reservation. In a more extreme case, the application of state law could affect all the land in a reservation and result in eliminating the reservation. Changes in ownership of reservation land adjacent to watercourses may also have a critical impact on reservation activities such as farming, hunting, and fishing. Reservation lands might be cut off from sources of water essential for irrigation, or from accustomed stations for tribal hunting and fishing.

Because of the federal interest in protecting Indian tribal lands, the determination whether the movements of the Missouri River reduced the size

of the Omaha Reservation is a matter of federal law. Federal law may in many cases be the same as state law; indeed, federal law may have been modeled on state law where state law is consistent with federal policy. But as this case demonstrates, there are differences between the law of accretion and avulsion as it prevails in different states and as it has been adopted as a matter of federal common law. Those differences flow from generalized law-making judgments by the courts (or legislatures) of how best to resolve the competing claims arising from the movement of water courses. Where Indian tribal lands are concerned, the federal government has a substantial continuing interest in the protection of such tribal lands and in effectuation of the purposes for which Indian reservations were created. Accordingly, the question whether Indian title to a portion of a reservation has been lost must be determined by the application of federal common law, which embodies the sum of federal law-making judgments on the issues and interests involved.

B. Application of federal law is also required here because the border of the reservation—the thalweg of the Missouri River—coincided with the political boundary between Nebraska and Iowa at the time of the events in question. The location of this common boundary was therefore governed by the body of federal common law dealing with river borders of neighboring states or other political jurisdictions.

The 1943 compact between Iowa and Nebraska, which established the interstate boundary independent

of the river's future movements, itself disposes of petitioners' contentions that state law should apply because the location of the interstate boundary is no longer in doubt. As this Court held in *Nebraska* v. *Iowa*, 406 U.S. 117 (1972), Sections 2 and 3 of the compact require each State to recognize title that was "good in" the other State prior to the adoption of the compact. Prior to 1943, of course, federal law applied to determine the interstate boundary, and therefore also the coterminous boundary of the reservation. If the Tribe (and the United States) had good title to the Barrett survey area under federal law, this title was "good in" both States prior to 1943, and the compact prohibits Iowa from seeking to defeat the Tribe's title by invoking state law.

Moreover, the application of the federal common law governing the effect of river movements on political boundaries is justified because the thalweg marked the boundary of the grant to the Omaha Tribe as a political society.

ARGUMENT

I.

25 U.S.C. 194 PUTS THE BURDEN ON PETITIONERS TO PROVE THAT THE OMAHA TRIBE LOST TITLE TO THE BARRETT SURVEY AREA OF THEIR RESERVATION

Petitioners raise a number of questions regarding the proper construction of 25 U.S.C. 194, which provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Before turning to these specific questions, we will briefly review the background of the adoption of Section 194 and the principles that guide its interpretation.

A. Section 194 Should Be Given A Liberal Interpretation To Effectuate Congress's Policy Of Protecting Indian Lands

Section 194 is one of a group of statutes enacted in the late 1700's and early 1800's to protect Indian interests and particularly Indian land rights. In 1790 Congress passed the first of this series of enactments, popularly called Nonintercourse Acts, to regulate trade and other forms of intercourse between the various North American Indian tribes and non-Indians.[10] The 1790 Act and its successors regulated a great many aspects of interaction between Indians and non-Indians. Each of the enactments controlled trade tightly by making it an offense for anyone not licensed and bonded as an Indian trader to trade or attempt to trade with the Indian tribes, or even to be found in Indian country with items of the kind

[10] See the Act of July 22, 1790, ch. 33, 1 Stat. 137; the Act of March 1, 1793, ch. 19, 1 Stat. 329; the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of March 3, 1799, ch. 46, 1 Stat. 743; the Act of April 22, 1800, ch. 30, 2 Stat. 39. See also the Act of January 17, 1800, ch. 5, 2 Stat. 6.

customarily traded to Indians.[11] The enactments from 1796 on also provided for the establishment of the boundary of the lands of various Indian tribes, prohibited non-Indians other than licensed traders from entering these lands for purposes such as hunting or pasturing animals, and prohibited entry to certain Indian lands without a passport.[12]

The 1790 Act and its successors also included a number of provisions designed to protect Indian rights to property. The 1790 Act stated that no conveyance of lands "by any Indians, or any nation or tribe of Indians within the United States, shall be valid" unless it was "made and duly executed at some public treaty, held under the authority of the United States," 1 Stat. 138, and each of the succeeding acts included a similar provision.[13] Each of the enactments subsequent to 1793 also prohibited non-Indians from making settlements on lands belonging to any Indian

[11] Sections 1 and 3 of the Act of July 22, 1790, ch. 33, 1 Stat. 137; Sections 1 and 3 of the Act of March 1, 1793, ch. 19, 1 Stat. 329; Section 7 of the Act of May 19, 1796, ch. 30, 1 Stat. 471; Section 7 of the Act of March 3, 1799, ch. 46, 1 Stat. 745; Section 7 of the Act of March 30, 1802, ch. 13, 2 Stat. 142.

[12] Sections 1 to 3 of the Act of May 19, 1796, ch. 30, 1 Stat. 469; Sections 1 to 3 of the Act of March 3, 1799, ch. 46, 1 Stat. 743; Sections 1 to 3 of the Act of March 30, 1802, ch. 13, 2 Stat. 139-141.

[13] Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; Section 8 of the Act of March 1, 1793, ch. 19, 1 Stat. 330; Section 12 of the Act of May 19, 1796, ch. 30, 1 Stat. 472; Section 12 of the Act of March 3, 1799, ch. 46, 1 Stat. 746; Section 12 of the Act of March 30, 1802, ch. 13, 2 Stat. 143.

tribe, and authorized the use of force to remove persons who violated that restriction.[14]

The legislative precursor to Section 194 was Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683. This enactment amended the 1802 Nonintercourse Act[15] to provide an additional protection for Indian property rights. The amendment stated:

> That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burthen of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Except as it applied to "Indian tribes residing east of the Mississippi," the 1802 Act (and its 1822 amendment) was repealed by the Act of June 30, 1834, ch. 161, 4 Stat. 729, entitled "[a]n Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."[16] The 1834 Act was an

[14] Section 5 of the Act of March 1, 1793, ch. 19, 1 Stat. 330; Section 5 of the Act of May 19, 1796, ch. 30, 1 Stat. 470; Section 5 of the Act of March 3, 1799, ch. 46, 1 Stat. 745; Section 5 of the Act of March 30, 1802, ch. 13, 2 Stat. 141-142.

[15] The Act of March 30, 1802, ch. 13, 2 Stat. 139.

[16] Section 29 of the 1834 Act, 4 Stat. 734, repealed the 1802 Act, but added the proviso that "such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi * * *." Insofar as it

omnibus enactment combining a number of prior Indian statutes. Section 22 of the 1834 Act (4 Stat. 733) continued, with slight changes in language, the protection that had been added by the 1822 amendment. Section 22 provided:

> That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

This provision is now codified as 25 U.S.C. 194.

The 1834 Act also carried forward the other provisions of the earlier Nonintercourse Acts protecting Indians lands, including the prohibition against non-Indian settlement on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe," and the provision that no conveyance of lands "from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." Sections 11 and 12, 4 Stat. 730.

Since Section 194 and these other provisions of the Nonintercourse Acts were intended to protect Indians as they came into increased contact with non-Indians, these provisions must be " 'liberally construed, doubtful expressions being resolved in favor of the Indians.' " *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). This canon of interpretation is founded on the special relationship between the Federal Government and the Indian people, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). See *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956).

affected Indians east of the Mississippi, the 1802 Act was repealed by Section 5596 of the Revised Statutes (1873-1874).

With this background in mind, we turn to consider each of the interpretative questions raised by petitioners.

B. Section 194 Is Applicable To Suits In Which An Indian Tribe Is A Party Or In Which The United States, As Trustee For Individual Indians Or An Indian Tribe, Is A Party

1. Petitioners contend that because Section 194 refers to suits in which "*an Indian* may be a party on one side," it has no application to a suit brought by an Indian tribe, or by the United States as trustee for a tribe or for individual Indians (78-160 Br. 26-29; 78-161 Br. 15-17). At the outset we note that the use of the singular term "an Indian" should provide no basis for a restrictive interpretation of Section 194, since singular and plural terms are generally used interchangeably in federal statutes. 1 U.S.C. 1.[17] More

[17] Section 1 of Title 1, which sets forth general rules of construction for the remainder of the United States Code, provides that "unless the context indicates otherwise—words importing the singular include and apply to several persons,

important, the narrow construction of Section 194 that petitioners advocate is wholly inconsistent with Congress's broad protective policy, and it would lead to the anomalous result that the burden of proof would differ in cases involving precisely the same substantive claims depending on who was the formal party to the suit.

The purpose of Section 194—to ensure that Indians are not deprived of their lands in judicial proceedings unless non-Indians can affirmatively prove their claims—is equally applicable when a tribe, rather than an individual Indian, is a party, or when the United States brings suit as trustee for Indians. Section 194 should be construed to effectuate its protective purpose.[18] As we have shown, Section 194 was one of the many provisions of the 1802 and 1834 Nonintercourse Acts that were designed to protect Indian possession of lands "belonging, secured, or granted by treaty with the United States to any Indian Tribe." See Section 11 of the Act of June 30, 1834, ch. 161, 4 Stat. 730. Construing Section 194 as inapplicable to suits brought by an Indian tribe would deny the protection of that provision to most Indian trust lands, since as a general matter "'[w]hatever title the Indians have is in the tribe,

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parties, or things," and "words importing the plural include the singular."

[18] This Court has often recognized "the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others." *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 211 (1943).

and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'" *United States* v. *Jim*, 409 U.S. 80, 82 (1972), quoting *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902).

Moreover, construing Section 194 as inapplicable to suits in which a tribe or the United States represents the interests of individual Indians would make the burden of proof turn on the wholly formal matter of the name or names in which the suit was brought, without regard to the interests that Congress was seeking to protect. There can be no doubt that by its express terms Section 194 applies to a suit brought by one *or more* individual Indians: It is applicable whenever "an Indian" is "a party." Accordingly, Section 194 would be applicable to a suit in which all of the individual members of a tribe were parties. Yet petitioners contend that Section 194 does not apply if the same suit is brought in the name of the tribe. And, although either the United States [19] or a tribe [20] may bring suit on behalf of an individual Indian, petitioners contend that Section 194 should be construed as inapplicable where a suit seeks to enforce the rights of an individual Indian—who is clearly the real party in interest—if the suit is brought in the name of the United States or his tribe.

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[19] See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413 (1912) (suit on behalf of allottees); *Oklahoma* v. *Texas*, 258 U.S. 574 (1922) (same).

[20] See, *e.g.*, *Puyallup Tribe, Inc.* v. *Washington Game Department*, 433 U.S. 165, 169-173 (1977).

In light of Congress's protective purpose and the rule requiring that any ambiguity be resolved in favor of Indian interests, there is no justification for giving Section 194 the "crabbed or restrictive meaning" that petitioners propose. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 176 (1973).

2. Petitioners urge (No. 78-160 Br. 28; No. 78-161 Br. 15-16), however, that the change from the language used in the original amendment passed in 1822—referring to actions in which "Indians shall be a party"—to the language used in the 1834 Act—referring to actions in which "an Indian may be a party"—shows that Congress deliberately limited the latter provision, now codified as Section 194, to exclude claims by groups of Indians or Indian tribes.

Nothing in the legislative history supports the notion that Congress in 1834 intended to narrow the scope of the protective amendment added in 1822. To the contrary, although the only committee report prepared in 1834 does not discuss Section 194 (Section 22 of the 1834 Act),[21] the available evi-

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[21] H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834) includes a discussion of the bill ultimately passed as the 1834 Act, as well as two other bills. It contains no discussion of Section 194 (Section 23 of the proposed bill, reprinted *id.* at 32). The portion of the report cited by petitioners (No. 78-160 Br. 32), when read in context, refers only to the provisions for licensing Indian traders (*id.* at 11):

> The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms and no doubt have much reason to complain of fraud and imposition. Some further provision seems necessary for their protection. Heretofore, it has been considered that every person (whatever might be his character) was entitled to a license on offering his bond. It has been the source of much complaint with the Indians. Power is now given to refuse licenses to persons of bad character, and for a more general reason "that it would be improper to permit such persons to reside in Indian country;" and to revoke licenses for the same reason.

dence shows that no change was intended. The 1834 Act appears to have been the outgrowth of a report by General William Clark and Governor Lewis Cass that proposed the codification of many existing Indian statutes into one law. The Clark-Cass report is set out in H.R. Doc. No. 117, 20th Cong., 2d Sess. (1829).[22] It includes a proposed revised Indian statute similar to the statute ultimately enacted in 1834. With respect to each section of the proposed statute, the report sets out the source of the section and states whether any change was intended from existing law. 25 U.S.C. 194, as it was enacted in the 1834 statute, is set out as Section 27 of the 1829 report, and the annotation accompanying that section indicates that no changes were contemplated.[23]

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[22] The Clark-Cass report was prepared in response to a resolution of the House of Representatives; the authors were invited to prepare "a revised system of laws and regulations on the subject of our Indian affairs," and their report was submitted to Congress by the Department of War. See *id.* at 1-3.

[23] The annotation merely states: "This enactment is taken from the fourth section of the act of May 6, 1822." In other sections of the proposed statute where significant change was intended, the annotations so indicated.

Although no change in the scope of the section was intended, the language of the 1822 amendment was modified to make the syntax consistent throughout. The 1822 version (Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683) had shifted uncomfortably between plural and singular terms (emphasis added):

> And be it further enacted, That, in all trials about the right of property, in which *Indians* shall be party on one side and *white persons* on the other, the burthen of proof shall rest upon *the white person*, in every case in which *the Indian* shall make out a presumption of title in *himself* from the fact of previous possession and ownership.

The 1834 version resolved this internal conflict by using singular terms to describe both the "Indian" party and the "white" party throughout the section.

Although petitioners offer no direct evidence of a congressional intent to do anything other than eliminate the results of the awkward drafting in the 1822 amendment, they argue that changes in other provisions of the 1802 Act show that Congress intended the 1834 Act to treat tribal property differently from property owned by individual Indians. In particular, petitioners focus on the change in Section 12 between the 1802 and 1834 Acts. Section 12 of the 1802 Act, 2 Stat. 143, provided that no conveyance or grant of land "from any Indian, or nation, or tribe of Indians" would be valid unless "made by treaty or convention entered into pursuant to the constitution." Section 12 of the 1834 Act applied only to a conveyance or grant "from any Indian nation or tribe of Indians." 4 Stat.

730. Petitioners infer from this change that Congress provided different schemes of protection for land owned by individual Indians, which would be covered by Section 194 (Section 22 of the 1834 Act), and land owned by a tribe, which would be protected by Section 12.

There is no evidence to show that the change from the plural to the singular in Section 194 had any relation to the change in Section 12. The latter change, removing the requirement that conveyances by individual Indians be made by treaty,[24] recognized the right of individual Indians to alienate their individual property and the obvious impracticality of requiring that all transfers of property by individual Indians be made by treaty, with the advice and consent of the Senate. This change had no effect on conveyances by Indian tribes, which required treaty validation under Section 12 of the 1834 Act just as they did under Section 12 of the 1802 Act. Since no change was made in the treatment of property transfers by tribes under Section 12, petitioners' claim that Congress intended a corresponding change to remove tribes from the protection afforded by Section 194 is, at best, speculation.

Because there were wholly independent reasons for the changes made in Section 194 and Section 12, no inference of an intent to narrow the scope of Section

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[24] *Jones* v. *Meehan*, 175 U.S. 1, 12-13 (1899), holds that Section 12 of the 1834 Act does not apply to conveyances by individual Indians.

194 may be drawn, especially since the Clark-Cass report to Congress that preceded the adoption of the 1834 Act showed no intent to make any change. The attenuated inference that petitioners seek to draw would be dubious in any context. It is plainly insufficient to justify a narrow reading of a provision intended by Congress to protect the Indian people.

C. Section 194 Applies To Suits About The Right To Property Between An Indian And A Non-Indian

Petitioners also contend (No. 78-160 Br. 29-32; No. 78-161 Br. 12-15) that the term "white person" in Section 194 refers only to an individual of the Caucasian race, and thus has no application to individuals of other races or to corporations or states.[25] This construction should be rejected because it is at odds with Congress's intent to protect Indians from the loss of their lands to non-Indians. Moreover, a review of the other provisions of both the 1834 Act and its predecessors reveals that Congress used the phrase "white person" in contexts where it plainly referred to all

[25] Petitioners additionally contend (No. 78-160 Br. 29-30) that there is no evidence in the record of their race. As we understand this suggestion, it is a subpoint of their main contention that Section 194 applies only if they are shown to be Caucasians. The claim is that there was no evidence that the individual petitioners are Caucasians. As we will show, however, Section 194 applies to all non-Indians, not merely Caucasians. So far as we are aware, petitioners have never asserted that they are Indians, and do not do so now. However, if there is a contention that one of the petitioners is an Indian, then that question could be referred to the trial court for a hearing.

non-Indians. In addition, the construction petitioners advocate—which draws a distinction between Caucasians and other non-Indians solely on the basis of race—should be rejected because it would raise grave doubts about the constitutionality of Section 194.

1. Interpreting the phrase "white person" in Section 194 as limited to individuals of the Caucasian race would undermine the protective policy of that statute. The protection of Section 194 could be avoided by Caucasian individuals by the simple expedient of forming a corporation through which to conduct their dealings with Indians.[26] And no protection would be afforded against the claims of any non-Caucasians. Construing 194 as applicable to actions between Indians and non-Indians is necessary to carry out Congress's policy of safeguarding Indian lands and other property.

2. Congress used the phrase "white person" in several sections of the 1834 Act in contexts where it was clearly intended to refer to all non-Indians. For example, Section 20 states that "any person" who sells

[26] The general rules of construction for the United States Code establish a presumption against a construction that would allow an individual to avoid legal restrictions by establishing a separate corporate entity. Section 1 of Title 1 provides that "unless the context indicates otherwise" the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies * * *." Cf. *Monell* v. *Department of Social Services*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

or gives liquor to an Indian in Indian country, or who attempts to introduce liquor into Indian country, will be subject to a fine; and the same section further provides that if government officials suspect "that *any white person or Indian*" has introduced or is about to introduce liquor into Indian country, the officials may order that person's goods searched. 4 Stat. 732. It is evident that the phrase "white person" was intended to include any non-Indian, since the authorization to search for suspected liquor was intended to effectuate the prohibition in the first portion of the section against "any person" introducing liquor into Indian country.[27] Similarly, Section 7 of the 1834 Act, 4 Stat. 730, forbids "any person other than an Indian" to barter with an Indian in Indian country for goods "of the kind commonly obtained by the Indians in their intercourse with the white people." Again, the term "white people" is evidently equated with non-Indians.

Other sections in earlier Nonintercourse Acts also used the phrase "white man" to refer to any non-Indian. Section 10 of the 1802 Act, 2 Stat. 142, provided that no citizen or other person could purchase "any horse of an Indian, or of any white man in the Indian territory, without special license." The same

[27] A further indication of Congress's intent is found in the draft statute included in the 1829 Clark-Cass report (see page 29, *supra*). Section 49 of the draft statute, which corresponds to Section 20 of the 1834 Act, provided that "any person" suspected of introducing liquor into Indian country could be searched. H.R. Doc. No. 117, *supra*, at 40-41.

provision was included in the Nonintercourse Acts of 1793,[28] 1796,[29] and 1799.[30] Since the provision was designed to regulate comprehensively the sale of horses in Indian country, it seems clear that the licensing requirement was intended to apply to the purchase of horses from any Indians or any non-Indians.

3. Petitioners and their supporting amici point out[31] that other sections of the 1834 Act employ different phrases—particularly "any person other than an Indian"—to refer to all non-Indians. They accordingly argue that when Congress said "white person," it meant Caucasian, not non-Indian. The argument rests on the unspoken premise that Congress used particular terms consistently and precisely throughout the 1834 Act.

But a review of the 1834 Act—which was, as we have noted, an amalgam of prior Indian statutes—shows that a variety of terms and phrases are used from section to section to refer to the same concept, and conversely the meaning of the same term may vary from section to section. Sections 13 through 15, 4 Stat. 731, use the phrase "any citizen or other person." In many other sections, the terms "person" or "any person" are used instead. See Sections 2, 9, 11, 12, 17, 20, 21, 26, 4 Stat. 729, 730, 731, 732, 733.

[28] Section 6 of the Act of March 1, 1793, ch. 19, 1 Stat. 330.

[29] Section 10 of the Act of May 19, 1796, ch. 30, 1 Stat. 471.

[30] Section 10 of the Act of March 3, 1799, ch. 46, 1 Stat. 746.

[31] See No. 78-160 Br. 30, No. 78-161 Br. 16; amici Indiana, *et al.* Br. 12-13.

In some sections of the 1834 Act, the unqualified term "person" appears to include Indians:

> Section 20 (4 Stat. 732) forbids "any person" to provide liquor to Indians in Indian country;
>
> Section 21 (4 Stat. 732-733) forbids "any person" to operate a distillery in Indian country;
>
> Section 26 (4 Stat. 733) authorizes the apprehension of "any person" charged with violating the Act.

In other sections, the term "person" is used in a context that seems to exclude Indians:

> Section 2 (4 Stat. 729) provides that no "person" may trade with Indians without a license; under Section 5 (4 Stat. 730), only citizens—a term that generally excluded Indians—could be licensed;
>
> Section 9 (4 Stat. 730) provides that no "person" may drive stock to range or feed on Indian lands;
>
> Section 11 (4 Stat. 730) provides that "any person" who settles on or surveys Indian land may be removed by military force and fined;
>
> Section 17 (4 Stat. 731) provides for the payment of indemnification if Indians destroy the property of "any person" lawfully in Indian country.[32]

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[32] Thus it is irrelevant that the word "person" in some sections of the 1834 Act, such as the provision (Section 3, 4 Stat. 729) that no "person" of "bad character" be licensed as a trader, refers to what petitioners call "flesh and blood people—human beings." (No. 78-160 Br. 29-30). This is only one of various usages of that word in the Act.

In view of the varying usage of other terms from section to section of the 1834 Act, it is no surprise that Congress used not only the phrase "any person other than an Indian" (Sections 4 through 7, 4 Stat. 729-730), but also the phrases "white people" and "white person" (Sections 7, 20, and 22, 4 Stat. 730, 732, 733), to refer to all non-Indians. The meaning of the language used in any particular section must be gathered from the purpose and context of that section. The purpose of Section 22—now codified as 25 U.S.C. 194—was to protect Indians against the loss of their lands to non-Indians. The phrase "white person" should be interpreted in light of that purpose and to effectuate it.

4. Petitioners urge the Court to apply here the decision in *United States* v. *Perryman*, 100 U.S. 235 (1879), which interprets the phrase "white person" in Section 16 of the 1834 Act, 4 Stat. 731, to exclude a black person. As we have shown, the meaning of particular terms and phrases varies from section to section of the 1834 Act, and thus the meaning of the phrase "white person" in Section 16 does not govern the meaning of that phrase in Section 22 (now 25 U.S.C. 194). Moreover, the *Perryman* decision was grounded on the peculiar legislative history of Section 16. That section provided for indemnification guaranteed by the government for the taking or destruction of Indian property by "a white person" committing a criminal offense in Indian country. The Court emphasized in *Perryman* that the words "a white person" had been substituted in Section 16 of the 1834

Act for the broader phrase "any such citizen [resident in the United States] or other person" used in the analogous section of the 1802 Act (Section 4 of the Act of March 30, 1802, ch. 13, 2 Stat. 141), and the Court concluded that this had been done with the intent of excluding fugitive black slaves who might seek refuge among tribes such as the Cherokees. 100 U.S. at 237-238. The government's brief in this Court argued (Brief for the United States, No. 153, October Term, 1879 at 7-8) that the change had been made because of the situation in Georgia, where the refusal of the Cherokees and Creeks to return fugitive slaves had led to armed warfare. The Court agreed with this interpretation, concluding that the change in language had been made "as a means of preventing the escape of slaves" because Congress believed that "if the United States made themselves liable only for such depredations as were committed by the whites, [the Cherokees] and other Indians would be less likely to tolerate fugitive blacks in their country." 100 U.S. at 238.[33]

[33] With respect, we question whether the Court's analysis of the legislative history was correct. The government's brief in *Perryman* provided no documentation for the assertion that the change in the language in Section 16 of the 1934 Act was intended to meet the fugitive slave problem, and we know of none. The 1829 Clark-Cass report described the purpose of the provision in effect in 1802 as follows:

> The 4th section of the act of March 30, 1802, introduces the principle of the eventual guarantee of the United States for the payment to the Indians of injuries to their property, *when committed by white persons* in the Indian country. The object of the law was, doubtless, to quiet the Indians, and to prevent them from seeking to obtain private satisfaction.

H.R. Doc. No. 117, *supra*, at 36 (emphasis added). The term "white persons" was thus used in the report synonymously with the broader language—"any such citizen or other person"—of the 1802 Act (see page 38, *supra*), which suggests that no change was intended by the substitution of the term "a white person" in the Act itself in 1834. (The Clark-Cass report was not referred to by the Court in *Perryman*, and so far as the briefs disclose it was not cited to the Court.)

In contrast, the language of Section 194 was not amended to meet any particular legislative purpose. Instead, the 1822 amendment to the 1802 Act, as carried over into the 1834 Act, simply used the words "white person" to mean non-Indian.

5. In addition, to interpret "white person" to mean Caucasian would raise serious doubts about the constitutionality of Section 194, which can and should be avoided by construing the term to mean non-Indian. "[L]egislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. 535, 554-555 (1974). As the Court explained in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are

> expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

But a provision discriminating between Caucasians and other non-Indians who dispute Indian property rights would stand on a completely different footing. As the Court stated in *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967):

> Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

The same standard applies to federal legislation under the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Since a distinction between Caucasians and other non-Indians in Section 194 would frustrate, rather than promote, the congressional policy of protecting Indian lands from dubious claims, we believe that it

could not withstand the strict scrutiny to which it would be subject.

Although the constitutionality of a distinction between Caucasians and other non-Indians in Section 194 is not presently before the Court, the construction of that statute should be guided by the serious constitutional doubts that would be raised if it were construed to apply only to suits between Caucasians and Indians. "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Since the construction of "white person" to mean non-Indian is far more than "fairly possible," it should be adopted.

6. The State of Iowa argues (Br. 15) that the phrase "white person" in Section 194 cannot be construed to include a state without "straining reasonable interpretation of the words used" and "rais[ing] serious federalism (and comity) problems."

Construing Section 194 as applicable to a state does not strain the meaning of the words used in Section 194. Assuming, as we have argued, that Congress used the phrase "white person" to refer to persons who are not Indians, the question is whether the states—which are certainly not Indians—are "persons" for the purposes of Section 194.

The word "person" is often used comprehensively to include artificial persons, including governmental bodies. This Court has on numerous occasions con-

strued the statutory term "person" to include the states. See, *e.g.*, *Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 261 (1972) (Section 4 of the Clayton Act, 15 U.S.C. 15); *Sims* v. *United States*, 359 U.S. 108, 112 (1959) (Section 6332 of the Internal Revenue Code of 1954, 26 U.S.C. 6332); *Georgia* v. *Evans*, 316 U.S. 159 (1942) (Section 7 of the Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, 210); *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (26 U.S.C. (1928 ed.) 205). Cf. *Pfizer Inc.* v. *India*, 434 U.S. 308, 311-313 (1978) (foreign nation a "person" under Section 4 of the Clayton Act); *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) (local government units "persons" under 42 U.S.C. 1983). As the Court stated in *Georgia* v. *Evans*, *supra*, 316 U.S. at 161:

> Whether the word "person" or "corporation" includes a State or the United States depends upon its legislative environment. *Ohio* v. *Helvering*, 292 U.S. 360, 370. [*United States* v. *Cooper*, 312 U.S. 600, 604-605 (1941)] recognized that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

The purpose of Section 194 and its "legislative environment" show that the term "person" should be read broadly to include the states. In many cases the state stands on precisely the same footing as a private landowner; indeed, it may have derived its claim of

title to the land in dispute from a private landowner by purchase, condemnation, or foreclosure of a tax lien. In such cases, if the private non-Indian owner had retained the claim to the land, and an Indian claimant had made out a presumption of title, Section 194 would have required the non-Indian claimant to carry the burden of proof. But, under petitioners' theory, if the state acquired its claim from the non-Indian—and presumably took no better claim than its grantor had—Section 194 would not apply as between the Indian claimant and the state.

Indeed, under petitioners' theory, if the state acquires a claim to an easement from a private non-Indian grantor, and the grantor's title to the property over which the easement runs is subsequently drawn into question by an Indian claimant, Section 194 would apply to all of the grantor's claim to the property, but not to the state's claim to the easement. Likewise, under petitioners' theory, if a single grantor divides his property, selling part to the state and part to private individuals, and an Indian claimant subsequently challenges the grantor's title, Section 194 would be applicable to the portion of the property sold to individuals, but not to the portion sold by the same grantor to the state.

It seems plain that the protective policy of Section 194 requires its application to the dispute between the Indian claimant and the state in these situations. Since the term "person" is sufficiently broad to include the states, it should be construed to effectuate

Congress's policy, especially since any ambiguity is to be resolved in favor of protecting Indian interests.

Petitioners and particularly the amici States[34] ignore the many circumstances where the states' rights are clearly no different from those of a private landowner, and they focus on the distinctive nature of the state's "sovereign" title to riverbeds acquired under the equal-footing doctrine. It is important to note that this case does not involve an Indian claimant invoking Section 194 in order to divest the State of Iowa of lands it has held since its admission to the Union. Rather, it involves a claim by the State of Iowa that the movements of the Missouri River—after the State's admission to the Union in 1846—divested the Omaha Tribe of title to land that was admittedly not part of the original grant to Iowa under the equal-footing doctrine. As this case indicates, the applicability of Section 194 to lands acquired by a state under the equal-footing doctrine is limited by the statute's requirement that the Indian claimant show a presumption of title based on previous possession or ownership. If title to particular land did vest in the state under the equal-footing doctrine, Section 194 would not apply unless Indians subsequently took title. Thus, the application of Section 194 to the states create no general threat to "sovereign" state lands.

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[34] This argument is made by amici California, *et al.* (Br. 34-37) and amici Indiana, *et al.* (Br. 16).

D. Section 194 Was Properly Applied In This Case

As we have shown, Section 194 is applicable to suits "about the right of property" between an Indian claimant—whether an individual Indian or a tribe, or the United States as trustee—and a non-Indian, when the Indian claimant establishes a presumption of title from previous possession or ownership. Even if this construction is accepted, petitioners urge that Section 194 was not properly applied in the present case. They contend that the government and the Tribe failed to establish a presumption of title and further that, if the presumption was established, the burden of *persuasion* should not have been placed on petitioners. These contentions are without merit.[35]

1. Petitioners contend (No. 78-160 Br. 32-35) that the government and the Tribe failed to establish a presumption of title to the land within the Barrett survey so as to invoke Section 194. They argue that applying Section 194 assumes the very point in controversy—namely that the land within the Barrett survey area today is the same land that was originally within the Barrett survey area of the reservation, rather than (as petitioners contend) new land built up by accretion after the original land was destroyed by erosion.

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[35] We note, however, that if the court of appeals did err in applying Section 194 to this case, it would be necessary to remand the case for reconsideration under the proper standard, since the United States and the Tribe contend that the district court's decision was erroneous even if Section 194 were inapplicable (and, indeed, even if all issues were governed by state law).

The court of appeals correctly rejected this contention (Pet. App. A21-A22). The court pointed out that it was undisputed that the 1854 treaty established the United States as titleholder of the Barrett survey area, which was part of the land set aside as a reservation for the Omaha Tribe. It was also undisputed that neither the United States nor the Tribe ever ceded or conveyed its interest in the Barrett survey area. Accordingly, the question was whether, as petitioners contended, the subsequent movements of the Missouri River deprived the United States and the Tribe of legal and equitable title to the area within the Barrett survey lines—what petitioners term "the same area under the sky." The court of appeals properly refused to deprive the Tribe of the protection of Section 194 because of petitioners' allegations that the land in this area had subsequently been destroyed by erosion, and new land formed within the area. The purpose of Section 194 is to require a non-Indian claiming title to land formerly owned by Indians to carry the burden of not merely alleging, but also proving, whatever facts are necessary to show that Indian title was extinguished and good title vested in the non-Indian claimant. This purpose applies whether the facts on which the non-Indian relies show an allegedly valid conveyance or whether they involve the movement of a river boundary that is alleged to have resulted in a change of title to a given area of land.

Petitioners also argue (No. 78-160 Br. 35-40) that the government and the Tribe could not establish

the requisite presumption of title under Section 194 by proof of ownership and possession so many years prior to trial, in light of the many changes in circumstances. They point out that under Iowa law they are the record titleholders, that they or their grantors have been in possession of the land for decades, and that this possession went unchallenged by the Tribe and the government for many years. They also contend that various evidentiary presumptions—such as the presumption of ownership that follows from record title, and the claimed presumption that river movements are accretive rather than avulsive—rebut the presumption of title arising from the showing that the Barrett survey area was part of the reservation in 1867.

Petitioners' claim that changes in circumstance over the years preclude the presumption of title necessary to invoke Section 194 ignores the clear directive of that section. Section 194 provides that once the Indian claimant shows "a presumption of title in himself from the fact of previous possession or ownership," the burden shifts to the non-Indian claimant to establish his own title. The statute does not require that the "previous possession or ownership" be recent. All of the evidence that petitioners cite is relevant not to the threshold showing of the Indian claimants' presumption of title, but rather to the ultimate issue of present ownership. In making their case on this ultimate issue, petitioners are entitled to rely on whatever presumptions may flow from the evidence they

introduce, and the same is true for the Tribe and the government.

2. Petitioners also argue (No. 78-160 Br. 41) that Section 194 does not require a non-Indian claimant to shoulder the ultimate burden of persuasion, but only the burden of going forward with evidence to meet the Indian claimant's prima facie case. Petitioners' contention ignores the fact that Section 194 itself distinguishes between a "presumption"—which imposes on the party against whom it is directed the burden of going forward with evidence—and the ultimate "burden of proof." [36] Under petitioners' construction, Section 194 would be redundant; it would simply state the truism that where an Indian claimant has made out a presumption of title, a non-Indian claimant has the burden of producing evidence to rebut the presumption. There is no basis for giving Section 194 such a circular construction.

E. A Restrictive Interpretation Of Section 194 Is Not Justified By The Policy Of Promoting The Security Of Title To Land

A central theme in the briefs filed by both petitioners and their supporting amici is the argument that Section 194 must be given the most restrictive inter-

[36] See, *e.g.*, *Mobile, Jackson & Kansas City R.R.* v. *Turnipseed*, 219 U.S. 35, 42-43 (1910) ("[T]he effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. * * * The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary."). See also Fed. R. Evid. 301.

pretation possible in order to avoid throwing into question title to land in huge areas in the United States that were once in Indian ownership (No. 78-161 Br. 8, 17; amici Indiana, *et al.* Br. 16; amicus American Land Title Association Br. 3-5).

In our view, petitioners and their amici greatly overestimate the impact Section 194 is likely to have. Amicus American Land Title Association lists some of the "extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of land" that has been instituted by the United States as trustee and by various Indian tribes in their own right (Br. 3-4 n.3). As the Title Association acknowledges (Br. 4; footnote omitted), the suits to which it refers are based on the claim "that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect." Most, if not all, of these suits are based on the requirement included in each of the succeeding versions of the Nonintercourse Acts (see page 22, *supra*) that any conveyance of tribal lands must be made pursuant to a treaty subject to congressional approval. See also *Oneida Indian Nation* v. *County of Oneida*, *supra*, 414 U.S. at 664-665; *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975). The central issues in virtually all of these cases are issues of law, such as whether the conveyance was subject to the Nonintercourse Act, and whether it was made by treaty with congressional approval. The provision in Section 194 affecting the "burden of proof" in "trials about the

right of property" will have little, if any, impact on those issues.[37]

It is true, nevertheless, that giving Section 194 the restrictive meaning petitioners advocate would reduce the number of cases where the Section might apply. But it would make the applicability of the section turn on factors wholly irrelevant to Congress's purposes in enacting it. For example, under petitioners' theory, if land claimed by an Indian is transferred from a Caucasian individual to a black individual or to a corporation, the protection of Section 194 is defeated. Likewise, if the United States sues as trustee for and co-plaintiff with an individual Indian, to enforce his property claim, Section 194 applies; but if the individual Indian is not joined as a formal party, Section 194 cannot be invoked, on petitioners' theory, even though precisely the same interests are at stake. Neither dislike of the policy embodied in Section 194

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[37] So far as we know, Section 194 has not been applied in any of the cases cited by the Title Association. In *Mashpee Tribe* v. *New Seabury Corp.*, No. 78-1278 (1st Cir. Feb. 13, 1979), the tribe appealed from the decision of the district court dismissing their claim under the Nonintercourse Act of 1790 on the ground that the Mashpees were not an Indian tribe at all the relevant times. The court of appeals held that the Mashpees could not invoke Section 194 (whatever its applicability to the case might otherwise be) until they had established that they had been an Indian tribe at all relevant times, which the court said was a prerequisite to proving a presumption of title in the circumstances of the case (slip op. 22-23). The court expressly noted that it need not decide whether Section 194 may be invoked by an Indian tribe, or how to construe the term "white person" (slip op. 23 n.11).

nor fear of the statute's unaccustomed use justifies giving it an interpretation that would make its applicability turn on such random factors. The appropriate redress for any such grievances resides with the Congress.

II.

FEDERAL LAW DETERMINES WHETHER THE BOUNDARY OF THE OMAHA INDIAN RESERVATION WAS ALTERED BY THE MOVEMENT OF THE MISSOURI RIVER

As the court of appeals recognized (Pet. App. A13), this Court's decision in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), reaffirmed the longstanding rule that where no federal interest is implicated, "the laws of the several states determine the ownership of the banks and shores of waterways." In *Corvallis* the Court concluded that the equal-footing doctrine, under which the State of Oregon received title to the beds of navigable streams, did not provide a basis for applying federal law to determine the legal effect of the movements of the river after title had vested in the State and the riparian owner. *Corvallis* held that the general rule applicable to other federal land grants applies to equal-footing grants as well:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to

> those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

429 U.S. at 377, quoting *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis by the Court in *Corvallis*).

The Court concluded that state law governed the dispute between the State of Oregon and the riparian owner in *Corvallis* because there was no "claim of federal right" other than the equal-footing origin of the State's title. 429 U.S. at 372. Thus, *Corvallis* teaches that state law applies to determine the effect of the movements of a river on land rights unless there is "some other principle of federal law [other than title derived from the equal-footing doctrine or some other federal grant] requiring state law to be displaced." 429 U.S. at 371; see *id.* at 372.[38]

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[38] Iowa emphasizes (No. 78-161 Br. 23) the statement in *Corvallis* (429 U.S. at 370-371) that "the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." As we will discuss (page 72, *infra*), this statement cannot be read as holding that state title is not subject to federal common law even when continuing federal interests are present, in view of the Court's express recognition of circumstances where federal law applies (and may result in a title determination adverse to the state)—for example, where there is movement in a body of water that serves as an interstate boundary. See 429 U.S. at 375.

The decision of the court of appeals is fully consonant with *Corvallis*. As the court of appeals correctly concluded (Pet. App. A13-A20), there are two independent federal interests that require the application of federal law to determine the effect of the Missouri River's movements between 1875 and 1923 on the boundary of the Omaha Indian Reservation. First, the Omahas are asserting not merely title derived from a federal grant, but a federally created and protected right to continuing possession of tribal land; and the United States, which holds the tribal land in trust for the Omahas, is itself asserting its title in this suit. Second, at the time of the events in question the thalweg of the Missouri marked not only the boundary of the Omaha Indian Reservation (itself a distinct political entity), but also the interstate boundary between Nebraska and Iowa. The effect of the river's movements on this political boundary is governed by federal law, not by the law of either state.

There is no merit, then, to petitioners' argument that the application of federal law contravenes principles of federalism and the rule that "[t]here is no federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). The application of "specialized federal common law" to cases involving substantial federal interests is fully consonant with *Erie*. See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 407 (1964).

A. The Omaha Reservation Was Established By Federal Law And Is Held In Trust For The Tribe By The United States, Subject to Continuing Federal Protection And Supervision

In the 1854 treaty between the United States and the Omaha Tribe, the Tribe ceded to the federal government approximately 5 million acres of its aboriginal lands,[39] reserving "for their future home" an area not to exceed 300,000 acres to be designated by the President and "acceptable to them." Art. 1, 10 Stat. 1043.[40] The Tribe selected land in the Blackbird Hills area on the western bank of the Missouri River as the site for their reservation (A. 266, 270-274). The President concurred in the Omahas' selection, and the reservation was established as their permanent home (A. 265-274). The eastern boundary of the reservation was the center of the main channel of the Missouri River.[41] That land, as modified by subsequent

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[39] See *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275, 278 (1920).

[40] Article 1 also tentatively designated a portion of the ceded area to serve as a reservation if the Tribe deemed it acceptable. The Tribe rejected the tract identified in Article I (A. 266-274).

[41] Both the district court and the court of appeals held that the thalweg, or center of the main channel, formed the boundary of the reservation (Pet. App. A6 & n.5, B3). Although this finding was not challenged in the courts below, the petitioners in No. 78-160 now suggest (Br. 43-44 n.5) that the reservation extended only to the bank of the river until Nebraska relinquished ownership of the bed to riparian owners—including the Omahas—in 1906. This contention is without merit. The authorization for the original survey and the

treaty [42] and statutes,[43] has remained the Tribe's home.

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surveyor's notes describe the reservation as extending "from a given point upon the river to another point thereupon" (A. 271), and to the Missouri River and "thence down said river to place of beginning" (A. 270). Under federal law this description included the bed up to the thalweg. As this Court stated in construing similar language describing the boundary of a reservation as "up the Arkansas" and "down the Arkansas":

> Congress was accustomed to using the terms "up" or "down" the river when designating a navigable river as the boundary between States, see, *e.g.*, Act of March 2, 1819, § 2, 3 Stat. 490 (Alabama); Act of February 20, 1811, § 1, 2 Stat. 641 (Louisiana), and, when it did so, the boundary was set as the middle of the main channel [citations omitted].
>
> Given this congressional usage, it seems natural for the President, on whose behalf the treaties had been negotiated, to have given the same interpretation to identical language in the analogous situation involving the boundary between petitioners Choctaw and Cherokee Nations, which had long been considered sovereign entities. * * * The grants to petitioners were undoubtedly to them as "a political society," and any "well founded doubt" regarding the boundaries must, of course, be resolved in their favor.

Choctaw Nation v. *Oklahoma*, 397 U.S. 620, 631-632 n.8 (1970).

[42] The Omahas ceded a portion of their reservation for the settlement of the Winnebago Tribe by the Treaty of March 6, 1865, reprinted at 14 Stat. 667.

[43] The Act of June 22, 1874, ch. 389, 18 Stat. 146, 170, authorized the purchase of 20 sections of land from the Omahas for the location of the Wisconsin Winnebagos. The Act of August 7, 1882, ch. 434, 22 Stat. 341 (which superseded the Act of June 10, 1872, ch. 436, 17 Stat. 391), authorized the sale, with the Omahas' consent, of a portion of

The United States holds title to the reservation land in trust for the Tribe (Pet. App. A3 & n.2).

The 1854 Treaty clearly demonstrates the intention that with federal protection and assistance the Omahas were to support themselves by farming on the reservation. Article 4 (10 Stat. 1044) provided that the annuities to be paid to the Omahas could be used for purposes including "opening farms, fencing, breaking land, providing stock, agricultural implements, [and] seeds." In Article 8 (10 Stat. 1045), the government agreed to build a gristmill, a sawmill, and a blacksmith shop, to keep them in repair for 10 years, and to employ for 10 years a miller, a blacksmith, and an experienced farmer "to instruct the Indians in agriculture." In Article 10 (10 Stat. 1045), the Omahas "acknowledge[d] their dependence on the government of the United States, and promise[d] to be friendly with all the citizens thereof, and pledge[d] themselves to commit no depredations on the property of such citizens." In Article 7 (10 Stat. 1045), the United States agreed to protect the

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the reservation lying west of a previously granted right of way.

Although Congress also authorized the sale of "surplus" unallotted Omaha lands in the early 1900's, that program was never implemented. See the Act of May 11, 1912, ch. 121, 37 Stat. 111, as amended by the Act of January 7, 1925, ch. 34, 43 Stat. 726. Section 5 of the 1925 Act provided that the disposal of the unallotted lands of the Omaha Reservation "shall not become operative so long as the need thereof exists of maintaining an agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska."

Omahas "from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary."

The Treaty of 1865, 14 Stat. 667, in which the Omahas agreed to cede a portion of their reservation to provide a reservation for the Winnebagos, evidences the same intent that the Omahas would retain and farm their tribal lands.[44]

The federal interest in the Omahas and their Reservation has continued.[45] The United States continues

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[44] Article II of the Treaty, 14 Stat. 667, provided that the consideration paid to the Omahas could be used to pay "for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation." Article III provided that the services of the blacksmith, miller, and experienced farmer, which the government had agreed to provide for ten years under the earlier treaty, would be extended for an additional ten years. 14 Stat. 668. And Article IV stated that "[t]he Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves," wished to assign a limited portion of their land to the members of the Tribe "to be cultivated and improved for their own individual use and benefit." 14 Stat. 668. The treaty stated that the tracts assigned to individual members "shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress." *Ibid.*

[45] See also the Act of May 15, 1888, ch. 255, 25 Stat. 150 (appropriating $70,000 "to enable [the Omaha Tribe] to further improve their condition by making improvements upon their homesteads by the purchase of stock, cattle, agricultural implements, and other necessary articles"), and the Act of February 18, 1909, ch. 145, 35 Stat. 628 (authorizing

to hold the reservation land in trust. The Secretary of the Interior informs us that approximately $1,000,000 in federal funds was expended on the Omaha Reservation in fiscal year 1979 for management of the trust lands, social services, education, vocational training, and health services. The Omaha Tribe is now organized under a constitution promulgated pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* The Constitution and Bylaws of the Omaha Tribe of Nebraska were approved by the Secretary of the Interior on March 30, 1936. On July 28, 1936, the Secretary submitted a proposed corporate charter for the Tribe, which was ratified by the Tribe in a referendum held on August 22, 1936. The charter provides that "[i]n order to further the economic development" of the Tribe, it was "chartered as a body politic and corporate of the United States of America" and as a "Federal Corporation." Corporate Charter of the Omaha Tribe of Nebraska, ¶¶ 1, 2.

B. Indian Reservations Are Established By And Maintained Under Federal Law, And Federal Law Determines Whether Indian Title To Reservation Lands Has Been Lost Through The Movement Of A River On The Boundary Of A Reservation

1. The choice of law question in this case is governed by *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974). The Court held there that

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the payment of tribal funds for protecting tribal lands from overflow and for reclaiming tribal lands).

federal law governs tribal rights to Indian lands, since those rights arise under federal law and also are subject to continuing federal protection and supervision.

In *Oneida* the Tribe brought an action in federal district court to recover the fair rental value of land the Tribe alleged it had ceded to the State of New York in 1795 without the consent of the United States that was required by Section 4 of the Nonintercourse Act of July 22, 1790, ch. 33, 1 Stat. 138. The Tribe invoked the district court's federal question jurisdiction under 28 U.S.C. 1331 and 1362. The district court dismissed the case for want of subject matter jurisdiction, holding that a claim for possession of real property arises under state, not federal law, and the court of appeals affirmed (464 F.2d 916).

This Court unanimously reversed. "Accepting the premise of the Court of Appeals that the case was essentially a possessory action," the Court held that the asserted Indian "right to possession [was] conferred by federal law, wholly independent of state law." 414 U.S. at 666. The Court recognized the general principle that "[o]nce [a federal] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts * * *." 414 U.S. at 676. But it held that Indian title, such as the Oneidas asserted, was different (414 U.S. at 677):

> In the present case, however, the assertion of a federal controversy does not rest solely on the

> claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession. [46]

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[46] The Court distinguished *Taylor* v. *Anderson*, 234 U.S. 74 (1914), holding that an individual Indian's suit for ejectment did not arise under federal law, on the ground that that case did not involve a tribal claim to land under continuing federal protection and supervision, but rather a claim based on "[i]ndividual patents * * * with only the right to alienation being restricted for a period of time." 414 U.S. at 676. The claimants in *Taylor* were members of the Five Civilized Tribes, who received fee patents with restraints on alienation, rather than the trust patents issued under the General Allotment Act of 1887, 24 Stat. 388. See F. Cohen, *Handbook of Federal Indian Law* 434-435 (1942). At the time of the *Taylor* decision it may have been appropriate to treat an individual Indian who had received an allotment (or a fee patent subject to restrictions on alienation) like other federal patentees. The government's policy was to allot tribal lands to individual Indians with the expectation that the individual allottees would soon take unrestricted fee title and the reservations would be abolished. See *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973); *Handbook of Federal Indian Law*, *supra*, at 206-215. Congress repudiated the allotment policy in 1934, see *id.* at 215-217, and the federal government extended its protective jurisdiction over allotted lands indefinitely. See *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 477-479 (1976); *Mattz* v. *Arnett*, *supra*, 412 U.S. at 496 n.18.

Mr. Justice Rehnquist in his concurring opinion emphasized the same point (414 U.S. at 684; emphasis in original):

> In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility.

Although the specific question in *Oneida* was whether the Tribe's claim presented a federal question for jurisdictional purposes, petitioners ignore the substance of the decision in suggesting (No. 78-161 Br. 24-25) that it left open the question whether federal or state law would be applied after the court's jurisdiction was invoked. The decision in *Oneida* was grounded on "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent" and "the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." 414 U.S. at

670. The Court found that these principles had been expressed in many of its earlier cases. It stated (*id.* at 668) that its decision in *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941), had "succinctly summarized the essence of past cases" as follows:

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U.S. 219, 227.

Similarly, the Court pointed out (414 U.S. at 671-672) that its decision in *The New York Indians*, 72 U.S. (5 Wall.) 761, 769 (1867), had held that "New York 'possessed no power to deal with Indian rights or title,' " and that accordingly the State's attempt to tax reservation lands was an invalid "interference with Indian possessory rights guaranteed by the Federal Government."

Oneida is fully consistent with the decision three years later in *Corvallis*, *supra* (429 U.S. 363). Both decisions recognize the general rule that once property has passed from federal ownership there is no continuing federal interest, and consequently the incidents of ownership are matters of state property law. *Oneida* establishes that Indian claims of title to reservation land are not subject to state law, despite that general rule, because tribal land is the subject of continuing federal interest and control; indeed, in all but the original 13 States the property generally remains

in federal ownership in trust for the tribe. When a state or other claimants challenge Indian title, the question to be resolved is " '*whether* a title to land which had once been the property of the United States has passed' " out of federal trust ownership—which is, as the Court in *Corvallis* expressly recognized, a question that " 'must be resolved by the laws of the United States.' " 429 U.S. at 377, quoting *Wilcox* v. *Jackson*, *supra*, 38 U.S. (13 Pet.) at 517 (see pages 51-52, *supra*).[47]

Since the rights of the Omaha Tribe to the portion of its reservation depicted in the Barrett survey arose under and remain subject to the protection of federal law, *Oneida* establishes that the question whether the movement of the Missouri River terminated those rights must be determined by federal law.[48]

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[47] The consistency between the Court's decisions in *Oneida* and *Corvallis* is underscored by the fact that Mr. Justice Rehnquist, who specifically concurred in *Oneida* (414 U.S. at 682-684), wrote the opinion for the Court in *Corvallis* (429 U.S. 363).

[48] Amici California, *et al.* argue (Br. at 28) that *Oneida* is distinguishable because it involved aboriginal title and the question whether such title had been terminated. This argument is without merit. In the first place, the Omahas had aboriginal title to the lands affected by the 1854 treaty, *Omaha Tribe* v. *United States*, 4 Ind. Cl. Comm. 627, 664-668 (1957), including the portion they reserved as their reservation. In addition, there is no reason to construe the *Oneida* decision so narrowly; the essence of the decision is that federal law applies to questions of tribal possession of reservation land because of the continuing federal interest in, and protection of, Indian possession of such land; this principle does not vary with the history of the particular reservation.

2. Petitioners contend that notwithstanding this Court's conclusion in *Oneida* that the nature and extent of Indian property rights are, and always have been, matters of federal law, two of this Court's earlier decisions establish a contrary rule that state law generally governs questions regarding Indian property rights. A review of these decisions demonstrates that they did not determine tribal claims to Indian lands and that they offer no support for petitioners' contention that state law governs the question whether tribal title to the Barrett survey area has been terminated.

Petitioners in No. 78-161 place their primary reliance (Br. 22) on *Oklahoma* v. *Texas*, 258 U.S. 574, 594-595 (1922), quoting a portion of that decision which states that Congress's intent in granting lands lying along the bank of a non-navigable stream will be determined, in the absence of other indications, by looking to state law, even where Congress "is disposing of tribal land of Indians under its guardianship." The case states no broad rule contrary to *Oneida*. The question before the Court was whether federal patents granting former reservation lands to the state, to settlers who entered under the public land laws, and to Indian allottees granted any right to the bed of a non-navigable river. The reservation had included the bed of the river to the middle of the channel. 258 U.S. at 593-594. All of the former reservation had been disposed of by patents that were silent on the question whether rights to the riverbed were conveyed. The state claimed the patents did not

convey any rights to the bed of the river, and that it owned the portion of the bed that had been part of the reservation. 258 U.S. at 594. The United States contended that the patents to the riparian lands were intended to convey the rights to the bed of the river as well. *Ibid.* This Court rejected the state's claim, stating that where no contrary evidence was shown, it would assume that when Congress disposed of federal land—including former reservation land—it intended the incidents of ownership to be determined by state law. *Id.* at 594-595. There was no dispute that Congress had intended to dispose of all the former reservation land, and the Kiowa, Comanche, and Apache tribes did not claim continued tribal ownership of the riverbed. Thus, *Oklahoma* v. *Texas* follows the general rule, restated in *Oneida*, 414 U.S. at 676, that in the case of lands not subject to continuing federal protection and supervision, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law * * *."

Petitioners in No. 78-160 rely (Br. 47) on *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 210 (1943), which they say requires the application of state law to determine "the incidents of [Indians'] ownership of real property * * * 'in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary.'" Petitioners' reliance is misplaced. The question in *Oklahoma Gas* was whether the state had the authority to license a power company to run its

electric lines along a state highway through a quarter section held in trust for an Indian allottee. The highway was located on the allotted land pursuant to Section 4 of the Act of March 3, 1901, ch. 832, 31 Stat. 1084, which authorized the Secretary of the Interior to grant permission to state authorities "for the opening and establishment of public highways, *in accordance with the laws of the State or Territory in which the lands are situated*" (emphasis added). State law permitted the location of the electric lines as a lawful highway use. The Court's statement (318 U.S. at 210) that it would apply state law "in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary" was made in the light of its recognition that the statute expressly referred to state law as applicable to the "establishment" of the highways, and its acknowledgement that there was "no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use." 318 U.S. at 209-210.

Even in the face of the express statutory reference to state law, the Court sought to determine whether any federal policy or Indian interest required the application of federal law. It found that the application of federal law was not necessary to protect Indian interests, "for the Indians are subject only to the same rule of law as are others in the State, and then only by permission of the Secretary," subject to whatever requirements he deemed it necessary to impose on the highway permits he granted.[49]

3. As the present case illustrates, legal doctrines interpreting the movement of a river can substantially alter Indian land holdings. The case now before the Court involves 2,900 acres "under the sky" [50] that respondents claim should be restored to the Omaha Reservation, while the Tribe claims an additional 8,000 acres along the same river.[51] The application of state law to deny the Tribe such large areas of valuable farm lands could seriously interfere with the purpose of the reservation, which, as we have noted (pages 56-57, *supra*), was to provide the Omahas with sufficient lands on which they could support them-

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[49] Petitioners (No. 78-161 Br. 22; No. 78-160 Br. 46) also cite *Francis* v. *Francis*, 203 U.S. 233, 242 (1906), but in that case the Court interpreted a federal treaty as a matter of federal law and "agree[d] with" the earlier decisions of the state supreme court construing the treaty provision. In *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77 (1922), which is cited by amici California, *et al.* (Br. 23), this Court rejected the state court's determination of the navigability of a river and held that a state admitted to the Union after an Indian tribe has been granted ownership of the bed of a river may not defeat the tribe's rights with a retroactive rule of property law; the cited portion of the opinion was dictum.

[50] We adopt this term as used by petitioners in No. 78-160 (Br. 32) to denote an area of specified latitude and longitude, irrespective of the river's movements. It is undisputed that the 2,900 acres under the sky depicted by the Barrett survey, and claimed by the government here, were originally part of the Omaha Reservation.

[51] See page 3, note 2, *supra*.

selves by farming. In an extreme case, a legal interpretation of the movement of a river might affect all the land within a reservation, with the consequence of eliminating the reservation.

Even where less substantial tracts are affected, changes in ownership of land adjacent to a river or stream, resulting from legal conclusions based on the movements of the water course, may have a critical impact on reservation activities such as farming, hunting, or fishing. Such changes in ownership could cut tribal lands off from access to a river that had provided water essential for irrigation, or from accustomed stations for tribal hunting or fishing. For example, when land is gradually built up along the bank of a stream as a result of artifical changes in the stream, most states treat such land as accretion belonging to the owner of the riparian land,[52] and that is the federal rule. *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 327 (1973).[53] But decisions in some states hold that lands resulting from such man-made changes in a body of water are state property.[54] Indeed,

[52] See 7 R. Powell, *The Law of Real Property* ¶ 984, at 614 (Rev. ed. 1977); 5A G. Thompson, *Commentaries on the Law of Real Property* § 2560, at 604-605 (1957).

[53] *Bonelli* was overruled by *Corvallis* insofar as it held that federal law applied, but not insofar as it defined the federal common law rule.

[54] California defines accretion (or "alluvion") as excluding land not formed by "natural causes." Cal. Civ. Code § 1014 (West 1954) provides that "[w]here, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation

state law might grant all land formed by accretion to the state rather than the riparian landowner. Cf. *Hughes* v. *Washington*, 389 U.S. 290 (1967) (federal law applied to determine title to ocean front accretions; under state law all accretions subsequent to 1889 belong to the state).

Applying state law doctrines such as these to Indian lands could deprive tribal land of its riparian character and frustrate the purposes for which the reservation was established. Moreover, as these examples suggest, state law may not provide a completely neutral principle for determining the federal rights at issue. There is a substantial financial incentive favoring the adoption of state doctrines that expand state ownership. See *State Land Board* v. *Corvallis*, *supra*, 429 U.S. at 393 (Marshall, J., dissenting). The results of such a generic incentive may be far more difficult to identify than particular instances in which state law is specifically hostile to federal (or tribal) interests. See, *e.g.*, *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

of material or by the recession of the stream, such land belongs to the owner of the bank * * *." The California courts have generally concluded that accretions caused by artificial conditions belong to the state. See, *e.g.*, *People* v. *Hecker*, 179 Cal. App. 823, 827-828, 4 Cal. Rptr. 334 (1960); *Long Beach* v. *Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 428 n.4 (1970) (dictum). Other California cases are collected in Annot., 63 A.L.R. 3d 249, 295-303 (1975). The Arizona Supreme Court reached a similar conclusion in *State* v. *Bonelli Cattle Co.*, 107 Ariz. 465, 489 P.2d 699 (1971), modified, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd on other grounds, 414 U.S. 313 (1973).

Here, because of the federal interest in protecting Indian tribal lands, the determination whether the movements of the Missouri River have reduced the size of the Omaha reservation must be governed by federal law. It is true, as petitioners point out (No. 78-160 Br. 50), that state law might be more favorable than federal law to Indian claims in particular cases—as might be the case, they suggest, if the Omaha Tribe were claiming lands by accretion. It may also be true, as petitioners urge (No. 78-161 Br. 25), that in many if not most cases state and federal law will be the same. Indeed, in some cases the federal rule may have been modeled on a state rule that was found to be consistent with federal policy. But as this case demonstrates, there are differences between the law of accretion and avulsion as it prevails in different states and as it has been adopted as a matter of federal common law. Those differences flow from generalized law-making judgments by the courts (or legislatures) of how best to resolve the competing claims arising from the movement of water courses.

For example, some states recognize what has been termed the "doctrine of re-emergence" (see *Bonelli Cattle Co.* v. *Arizona*, *supra*, 414 U.S. at 330 n.27), under which a riparian owner whose land has been destroyed by gradual erosion, or submerged, is entitled to reclaim new land built up in its place if the boundaries of the owner's former lands can be identified. See, *e.g.*, *Mikel* v. *Kerr*, 499 F.2d 1178 (10th Cir. 1974) (Oklahoma law); *Perry* v. *Irling*, 132

N.W.2d 889 (N.D. 1965). Other states hold that in such circumstances any new land formed is accretion belonging to the owner of the land to which it attaches. See, *e.g.*, *Wilcox* v. *Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). See generally Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. Rev. 429 (1967) (discussing cases involving reemergence from six states abutting the Missouri River); 7 R. Powell, *The Law of Real Property* ¶ 985, at 616-617 (Rev. ed. 1977). The choice between these two approaches involves a law-making judgment concerning the interests affected. Likewise, the question whether to recognize a presumption in favor of accretion—as Iowa does—is not a mechanical one but involves a policy judgment, a consideration of the interests at stake and the effect the chosen rule of law may have on them.

Where Indian tribal lands are concerned, the federal government—which created the tribal reservations, pursuant to treaty, and which still holds the land in trust for the Indians and exercises continuing protection over both the Indians and the land—has a substantial interest in the protection of such tribal lands and in the effectuation of the purposes for which the reservations were created. Accordingly, the question whether Indian title to a portion of a reservation has been lost must be determined by the application of federal common law, which embodies the sum of federal lawmaking on the issues and interests involved.

C. The Border Of The Omaha Indian Reservation Should Be Determined In Accord With The Federal Common Law Governing River Borders Between Political Jurisdictions

The movements of the Missouri River pertinent to this case occurred before 1927. At that time the boundary between the States of Nebraska and Iowa was the thalweg, or center of the main navigable channel, of the Missouri River. *Nebraska* v. *Iowa*, 143 U.S. 359 (1892). Since the Omaha Indian Reservation extended to the thalweg (see page 54 & note 11, *supra*), the reservation boundary coincided with the interstate boundary. It follows that the body of federal common law dealing with river borders between neighboring states or other political jurisdictions governed the legal effect of the shift in the river's position on these boundaries.

Petitioners and their supporting amici concede the well-settled rule that federal law governs disputes over the location of interstate boundaries. Indeed, the *Corvallis* decision, on which petitioners place heavy reliance, expressly acknowledged that state law is inapplicable where the shift in a river affects the boundary between two states (429 U.S. at 375):

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

See generally *Arkansas* v. *Tennessee*, 246 U.S. 158 (1918); *Nebraska* v. *Iowa*, 143 U.S. 359 (1892).

While recognizing that federal law governs the location of an interstate boundary, petitioners contend that that principle is inapplicable here because of the adoption of the 1943 interstate compact, which established the political boundary between Iowa and Nebraska independent of the future movements of the Missouri River. Petitioners argue that because "[t]his litigation could not possibly affect the boundary between Iowa and Nebraska as it presently exists," this basis for applying federal law has been removed (No. 78-161 Br. 19; see also No. 78-160 Br. 44-45). Petitioners in No. 78-160 concede (Br. 44) that "if these cases had been litigated prior to 1943, they might have involved a determination of the boundary between Iowa and Nebraska," so that federal law would apply.[55] But they urge that the

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[55] Amici California, *et al.* disagree with this concession. They urge (Br. 18-19) that if the dispute arose before 1943, the location of the interstate boundary would have been resolved by the application of federal law, but disputes over title to land would then be resolved by the application of state property law. To the contrary, conflicting claims of sovereign title to property, as well as disputes over political boundaries, have been resolved in this Court by the application of federal law. See, *e.g.*, *Texas* v. *Louisiana*, 410 U.S. 702, 703 (1973). Similarly, federal law governs conflicting state claims over the apportionment of water in an interstate stream. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 & n.119 (1964). Accordingly, if the dispute had been litigated prior to 1943, federal law would have been applied to determine the boundary of both the State of Iowa's political jurisdiction and its sovereign title to the bed of the Missouri River, which would have been coextensive, and the remainder of the bed

interstate compact, as construed in *Nebraska* v. *Iowa*, 406 U.S. 117 (1972), eliminates this ground for applying federal law.

But the compact, as this Court construed it in *Nebraska* v. *Iowa*, provides no support for the claim that state law may now be applied to defeat tribal title that would have been valid under federal law if the question had been litigated prior to 1943. As this Court construed Sections 2 and 3 of the compact, each state is obligated to recognize title to land affected by the boundary change if title was "good in" the other state prior to 1943. 406 U.S. at 120, 122. Accordingly, if the Tribe's title would have been valid under federal law—and thus "good in" both Iowa and Nebraska prior to 1943—the compact requires the states to recognize that title. The compact itself thus disposes of petitioners' argument that tribal title "good in" both states prior to 1943 may now be held invalid under state law.

In the present case, moreover, there is an additional reason for applying federal law: Whatever may be said about the interstate boundary, this case plainly will determine the boundary of the Omaha Indian Reservation. As this Court has recently reaffirmed, Indian tribes "remain 'a separate people, with the power of regulating their internal and social relations.'" *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978), quoting *United States* v. *Kagama*, 118

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would have been the property of the Omaha Indian Tribe whose reservation extends to the thalweg of the river.

U.S. 375, 381-382 (1886). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, *supra*, 435 U.S. at 323. Indian tribes are political entities "subject to the general jurisdictional principles" that absent federal legislation to the contrary, "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams* v. *Lee*, 358 U.S. 217, 220." *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979), slip op. 6. Since the reservation lands were granted to the Omaha Tribe as a "'political society,'" the determination of the reservation's boundary should be governed by the principles for determining the "'boundary between nations or States.'" *Barney* v. *Keokuk*, 97 U.S. 324, 331 (1876), quoting *Haight* v. *City of Keokuk*, 4 Iowa 199 (1856); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 n.8 (1970). Cf. 18 Op. Att'y Gen. 230, 231 (1885).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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